

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 884 OF 2018

Borivali Sai Suman Co-operative ... Petitioners
Society Ltd and 2 Ors.

vs.

Sarah Enterprises and 2 Ors. ... Respondents

WITH

INTERIM APPLICATION NO. 288 OF 2020

IN

ARBITRATION PETITION NO. 884 OF 2018

Nandkishor Babli Gaonkar and Anr. ... Applicants

In the matter between

Borivali Sai Suman Co-operative ... Petitioners
Society Ltd and 2 Ors.

vs.

Sarah Enterprises and 2 Ors. ... Respondents

WITH

CHAMBER SUMMONS NO. 725 OF 2019

IN

ARBITRATION PETITION NO. 884 OF 2018

Rasik Dhirubhai and Bhadani ... Applicants

In the matter between

Borivali Sai Suman Co-operative ... Petitioners
Society Ltd and 2 Ors.

vs.

Sarah Enterprises and 2 Ors. ... Respondents

**RAJESHWARI
RAMESH
PILLAI**

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WITH
ARBITRATION APPLICATION NO.310 OF 2018

Sarah Enterprises ... Applicant

vs.

Borivali Sai Suman Co-operative ... Respondent
Society Ltd and 2 Ors.

WITH
COURT RECEIVER'S REPORT NO. 491 OF 2021
COURT RECEIVER'S REPORT NO. 221 OF 2019
COURT RECEIVER'S REPORT NO. 304 OF 2018

Mr. Rohaan Cama a/w. Mr. Anish Karande, Mr. Tejas P. Kasar and Mr. Amar Mishra i/b. SRM Law Associates for the Petitioner in ARBP/884/2018 and for the Respondent in ARBAP/310/2018 .

Mr. Gul Madnani for Respondent nos. 1 and 2 in ARBP/884/2018 and for the Applicant in ARBAP/310/2018.

Ms. Lakshmi Murali a/w. Ms. Shweta Kamble i/b. M/s. Lakshmi Murali & Associates for the Respondent.

Mr. Balakrishna Adyanthya for the Applicants in IA/288/2020.

Ms. Laxmi Murli for the Applicant in CHS/725/2019.

Mr. S. K. Dhekale, OSD, Court Receiver.

CORAM : A. K. MENON, J.

DATED : 14th FEBRUARY, 2022

P.C. :

1. Called for final hearing and disposal. By this petition under Section 9 the petitioner has sought various reliefs in relation to redevelopment rights in respect of building Borivali Sai Suman Co-operative Housing Society, Sainath Nagar, D. N. Mhatre Road, Eksar, Borivali (West), Mumbai-400 103 ["Society"]. The Society is said to house 60 residential flats. The members had

consented to execution of an Agreement of Development dated 17th May, 2008 between the petitioner no. 1– Society and the respondent—a partnership firm. It was agreed that respondent would redevelop the society's building. Vide Clause 1 of the agreement the society agreed to grant the development rights in favour of the respondent. Developers were required to obtain all necessary permissions, obtain IOD, CC and complete construction of the building to accommodate the existing members. As is customary in these transactions, the developer was be entitled to sell free sale flats to interested purchasers. Disputes arose between the parties as a result of which this petition came to be filed.

2. The Court Receiver was appointed on 6th September, 2018. After hearing parties the court observed the petitioners having executed Agreement in 2008 had handed over possession of the flats to the developer in 2010. The respondent thereafter demolished the structure. A new building was to be put up within 22 months. However a Supplementary Agreement dated 25th October, 2014 came to be executed in which possession was promised to be given by 31st October, 2015. Despite eight years having passed after handing over possession, the respondent had not completed the work. The respondent also did not pay compensation towards Temporary Alternate Accommodation. Property tax also remained in arrears and was in excess of Rs. 5 crores as on date of that order. The order dated 6th September, 2018 records satisfaction of this court that the developer had cheated the original members and left them and their family members without a roof and completely in the lurch.

3. A prima facie case having been made out an independent Architect was appointed to visit the suit premises on 10th May, 2018 and to make a report. Such report has been made and has been presented to court. The Court Receiver was appointed of the building and has since been in possession. The court also found that the developer was not willing to pay rent thus aggregating to Rs 5 crores which he agreed to pay in installments but he reneged and breached the undertaking given to court. The operative portion of the order dated 6th September, 2018 read as follows :

(a) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the property of the Society. The Court Receiver shall forthwith take possession of the property and submit his report to this Court.

(b) The Developer who has repeatedly given undertakings to the City Civil Court since the last two and half years that he shall deposit amount of Rs.3.10 Crores and has only deposited Rs. 30 lakhs, is now directed to forthwith deposit the admitted arrears of Rs.5.4 crores with the Prothonotary and Senior Master of this Court.

Despite paragraph 20(b) directing the respondent to deposit arrears of Rs. 5.4 crores with the Prothonotary and Senior Master of this court, the respondent failed to do so.

4. Furthermore, the court found that several of the documents were said to be in the custody of the Architect appointed by the respondent. It appears that the Architect appointed by the respondent was holding custody of

various documents and when the petitioner approached the Architect, he had informed the petitioner that he would not release any documents without written authorization of the respondent. He was probably justified in doing so. However the court on 10th September, 2018 directed the Architect to produce all documents in court on 11th September, 2018. On 11th September, 2018 the Architect was not present but he had addressed an email to the petitioner requesting extension of time to comply with the order of 10th September, 2018. The Architect was accordingly directed to comply with the order on 18th September, 2018. On 18th September, 2018 the Architect appeared in court and he submitted documents and drawings in relation to the suit property which were taken on record. Copies were directed to be handed over to the parties.

5. In this state of affairs, the court having found that the property taxes had also remained in arrears, the respondent was directed to pay balance property taxes failing which the property of the society was at risk of being auctioned by the Corporation. On 27th September, 2018 the court recorded that the Government Pleader had informed the court that several complaints had been received against the developer from the purchasers of flats under the free sale category. Some of these persons claiming to be purchasers are before this court and have filed applications being Interim Application No. 288 of 2020 and Chamber Summons No. 725 of 2019 which are pending. I have heard the learned counsel for these parties as well who seek to submit that their rights should be protected in some manner.

6. The application today is for grant of further reliefs under Section 9 since property is now custodia legis. Mr. Cama therefore in support submitted that considering the conduct of the developer and his having failed to comply with the orders of the court relief in terms of prayers (i) to (n) of this petition may be granted.

7. Mr. Madnani has in opposition contended that the respondent-developer had filed Arbitration Application No. 310 of 2018 seeking appointment of sole Arbitrator. He submits that since several orders have already been passed and property is now custodia legis, a Sole Arbitrator be appointed and further reliefs may be applied for under Section 17. To this Mr. Cama has pointed out that this court has in one amongst several orders dated 6th November, 2019 after a detailed consideration of the factual aspects, recorded in paragraph 28, 29 and 30 recorded as follows :

“28. Leaving open all contentions of Mr. Madnani as to what has been paid and to be adjusted, I will require Sarah Enterprises as a condition precedent to consider any application it seeks to make, to first bring into Court that entire amount of Rs. 10 lakhs payable to the Municipal Corporation.

29. The amount now due to the society is Rs. 8,08,71,056/-. I had very early on warned Mr. Madnani that his clients’ constant prevarications and breaches of undertakings would cost them dear. Given the background, I will round this off to Rs. 9 crores because by the time this amount is paid and distributed it will undoubtedly have gone up.

30. *Faced with this Mr. Madnani says to me exactly what he was saying to all this time to Kathawalla J and with the same spectacular lack of success: that he will take instructions. That time for taking instructions is now gone. I am making it clear that unless Sarah Enterprises brings in this amount of Rs. 9.10 crores on or before 29th November, 2019, it will not be heard on any aspect of either of these two matters. I will not allow it to invoke arbitration in its application or to seek rights under a contract if it is demonstrably unable to fulfill its obligations and commitments made even to Court. The consequences then will speak for themselves. The society, for its part, has filed both Section 9 petition and a Section 11 application, and orders can be appropriately made in these."*

8. In paragraph 30 we have seen that the court recorded unless the amount is deposited on or before 29th November, 2019 the respondent was not entitled to be heard or permitted to invoke arbitration in its application or seek appointment of a Sole Arbitrator. The reasons for the court ordering so are evident from the order dated 6th November, 2019 itself. For the sake of brevity I do not propose to repeat what else is stated in that order. It has set out in detail the nature of the dispute and the developer in the case leading up to the requirement of appointing a Court Receiver. In that view of the matter I am of the view that Mr. Madnani's request cannot be accepted today. The right of the respondent to pursue arbitration is kept open. However, it is obvious that the society and its members cannot be left in the lurch. The

agreement has been terminated. Admittedly there is no challenge to the termination.

9. Mr. Madnani has ofcourse questioned the termination in his reply. Mr. Madnani has submitted that the termination has not been accepted. However the fact remains that there is no challenge to the termination. The respondent has not adopted any proceedings save and except the above Arbitration Application. In that view of the matter I do not find it appropriate to appoint an Arbitrator today.

10. Respondent no. 1 has consistently failed to comply with the directions of the court and in that respect by virtue of the provisions of Order 39 Rule 11 (Bombay Amendment) of the Code of Civil Procedure the court is empowered to treat the default and breach by party in strike of their defence. The respondent is aware that it is in breach of the earlier orders and has persisted in its attempt to seek appointment of the Arbitral Tribunal without complying to the orders of the court. This has led this court to observe that respondent no. 1 will not be allowed to proceed in its Arbitration Application unless they comply with the earlier orders. The Division Bench of this court in the case of *Ramavatar Surajmal Modi vs. Mulchan Surajmal Modi*¹ has reiterated this power of the court under Order 39 Rule 11 and in the present case that would translate into petitioner becoming entitled to appoint another developer since agreement has already been terminated and process of appointing a substitute developer to proceed with the work must be prioritized. For long periods of time the members of the society have been

¹ AIR 2004 Bom 212

made to suffer, apparently for no fault of their own and it is not uncommon if one finds that a defaulting developer is relieved of his right to construct and complete construction on the property. That is the only way forward in situations that have been created apparently by defaults of respondent no.1.

11. The observations of the Division Bench in *Meeti Developers vs. Punjab National Bank Workers Co-operative Housing Society Limited*.² are material. In that case also the court found that the developer failed to carry out obligations and sought reference to arbitration. The court observed that it would be open for the developer to seek reference to arbitration if developer satisfies the Arbitral Tribunal that the termination was wrong and that society's redevelopment could not be held up especially since members have been out of their homes since years.

12. The factual matrix in the present case is similar to numerous other matters in which courts are faced with situations where defaulting developers have caused hapless members of society to await reconstruction of their property for years on end. The court has found in *Vaidehi Akash Housing Pvt. Ltd. VS. New D.N. Nagar Co-op Housing Society Union Ltd & Ors*.³ where the developer could not proceed with the redevelopment project on account of numerous impediments. The court found the developer had committed breaches of the development agreement of the society and the termination of the agreement was legal and proper. *Vaidehi (supra)* had not made out any case of readiness and willingness to perform its obligations to the society

² ARBPL-1789-2021

³ 2015 SCC Online Bom 8698

under the development agreement and was not entitled to specific performance of the agreement. The court found that *Vaidehi (supra)* could not prevent development of the property by the society through alternate builders. The challenge on behalf of the developer was not found to be bonafide. Furthermore, some of the prospective purchasers with whom Vaidehi had entered into agreement were held not to have any case for specific performance of their respective agreements and none of the purchasers had any enforceable right against the society.

13. In the present case the respondent no. 1 had failed and neglected to perform its obligation. The termination has not been challenged and respondent had not made out any case of readiness and willingness to perform. Mr. Madnani was at pains to explain that his client was in custody and was unable to carry out his business. Thus it is obvious that the respondent no. 1 is in no position to carry out construction or complete construction. The balance of convenience in my view is clearly in favour of the petitioners. In view of the above I have no hesitation in holding that the relief sought by the applicant would have to be granted.

14. At this stage on behalf of the intervenors who proposes to seek to be impleaded a request is made that their rights be also protected. The case of intervenors appears to be akin to those prospective purchasers in *Vaidehi (supra)*. It is not for this court under Section 9 to protect the right of the intervenors, but Mr. Cama fairly states that in the event the intervenors approach the society with all documentation in support of their case that they

are innocent purchasers and their right should be considered and their interest protected by the society, the society will consider their representations, save and except for commercial terms which will be a matter for the society to consider. It is always open to the applicants in the Chamber Summons and the Interim Application to seek relief in their own independent proceedings. Needless to mention this order will be without prejudice to the rights and contentions of the society.

15. This court has also in its order of 5th December, 2019 observed thus :

“6. Evidently parties will need some time to consider possibilities and feasibility. In doing so, I am sure all stakeholders will bear in mind that following the termination by the society of the development agreement with Sarah Enterprises, there may no longer survive any question of Sarah Enterprises being able to exercise its rights to sale any unsold flats. If Sarah Enterprises accepts this, then one scenario will result. If it does not, then , Sarah Enterprises and its partners should bear in mind that they will continue to have the entirety of the liability to the society including bearing all project completion costs, all rectification costs and all payments of unpaid dues to the society members. The proposals being considered will have to keep these factors in mind.”

Needless to mention this order is without prejudice to the rights and contentions of the individuals who are seeking impleadment and they are entitled to adopt independent proceedings, if so advised. In conclusion I pass the following order :

- (i) Petition is made absolute in terms of prayer clause (i) to (n) both inclusive.
- (ii) The Court Receiver is directed to handover possession of the property to the petitioner subject to payment of all costs, charges and expenses by the petitioner-society. Such costs and expenses shall be assessed within a period of two weeks from today.
- (iii) Upon such charges being assessed ,the applicant shall pay charges within one week thereafter.
- (iv) Subject to the above, the Court Receiver stands discharged upon handing over of possession of the society without passing accounts.
- (v) In view of the above pending Court Receiver's Report Nos. 304 of 2018, 221 of 2019 and 491 of 2021 are disposed.
- (vi) Arbitration Petition No. 884 of 2018, Interim Application no. 288 of 2020 and Chamber Summons No. 725 of 2019 are also disposed.
- (vii) At the request of Mr. Madnani, Arbitration Application No. 310 of 2018 shall be listed on 28th February, 2022.

(A. K. MENON, J.)